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**FINAL RECOMMENDATIONS FOR  
THE PROPOSAL TO CREATE AN  
OMBUDSMAN'S OFFICE FOR COMMON INTEREST  
DEVELOPMENTS  
January 4, 2006**

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**Recommendation of the Joint Committee on Boards, Commissions,  
and Consumer Protection (Joint Committee)**

**ISSUE #1. Should the State create an Ombudsman's Office for Common Interest Developments?**

**Recommendation #1:** *There is clearly strong sentiment among some residents who live in Common Interest Developments for a degree of state involvement to help resolve their problems. There appears to be some sound policy reasons for creation of an Ombudsman.*

**Comments:** Currently, the state of California does not have an office devoted to Common Interest Developments, or CIDs. The Department of Real Estate has some minimal oversight responsibility when these developments are in their initial stages. But once a development is fully occupied by private citizens, the Home Owners Association (HOA) elected by the residents, has full authority to act on behalf of those residents. The HOA is subject to procedural rules about decision making and the conduct of elections, and has an obligation to act in ways that are open and comport with general notions of fairness and due process. Violations of those rules, or disputes that are not satisfactorily resolved, can only be resolved by some process outside the CID, either mediation, arbitration, or in the most extreme cases, filing of a judicial action.

There is little doubt that the number of CIDs in California is growing, and there is little reason to believe the increase will slow in the near future. However, it is not clear whether an adequate number of CID residents want the state involved. A recent poll by the Zogby polling firm, released after the November hearing, showed considerable satisfaction among CID residents with the communities they live in and the dispute resolution systems that exist.

This poll was not California-specific, and did not deal with the specific question before this Committee. It was sponsored by the Foundation for Community Association Research, a non-profit organization created in 1975 by Community Associations Institute (CAI), which provides education and resources to community associations nationally, and has been active during the pendency of the current legislation. This funding could be considered to undermine the credibility of the results. Nevertheless, Zogby is a reputable polling organization, and the poll

seems to have some indicia of reliability. In any event, the results in this poll contain some important information far exceeding the poll's margin of error of 3.5 percent.

Nationwide, there is significant participation in and satisfaction with some relevant aspects of CIDs. While Committee staff had initial concerns about participation in HOA activities, the Zogby poll showed only 28% of residents said they had never been to an association meeting. A 72% participation rate is certainly respectable, and shows a common sense level of attention to the concerns of the community. In addition, 90% said they were on friendly terms with their association board's members. If even remotely similar percentages held true in California CIDs, this would argue against too great a state intervention in the process, since both lack of participation and significant levels of dissatisfaction are key aspects of the argument that existing CID procedures fall short of what is necessary to keep these organizations running smoothly. Significantly, only 15% in the survey said they wanted to see more government control of their associations.

Eighty percent of Zogby's respondents said they had a positive assessment of how their dues are being used by the association. Similarly, 78% believe the association rules enhance the value of their property.

Moreover, 77% said they had never filed a complaint with their association about another member, and of the 23% who had, 72% said the complaint had been resolved to their satisfaction. And 76% of those who had been the subject of a complaint reported that it had been resolved to their satisfaction. These numbers, of course, still leave a significant, though not large percentage of residents who were not satisfied. Nor is it clear from this survey how California-specific numbers might look. However, the survey does help to put the testimony before this committee into some perspective.

Given the present record, there appears to be room for some state involvement in CIDs that would fall short of actual involvement in CID disputes.

#### *A. Informational Website*

At the very minimum, the Ombudsman could take over the operation of a CID informational website that is now being developed, in a more limited form, by the Dept. of Consumer Affairs and the Dept. of Real Estate. As noted in the Background Paper, a centralized source of the laws and rules applicable to CIDs would be valuable, both for board members who may not be fully conversant with the procedures and laws that govern their actions, and for residents who should be fully aware of how HOAs operate, and what limits they will be subject to as a member of a specific CID. There is no doubt that most ordinary citizens have a difficult time finding relevant laws and regulations applicable to them within the thousands of volumes of legal authority that govern a modern state like California. Since HOAs do have an obligation to operate within the law, a readily available resource compiling what laws, exactly, provide that framework, would be extremely valuable for homeowners who are, in the main, not trained as lawyers or legal researchers.

While the website cannot include the most relevant document to any CID resident – the CCRs applicable to that particular community – the site can make clear that the CCRs are, in fact, the

most important governing document in the CID, and urge that all residents know its contents, and review it closely when problems develop.

Secondly, the site could have a useful section specifically dealing with board meeting procedures, elections and rule changes. Many problems may arise because fundamental procedures have been neglected. For example, board meetings must be conducted openly, and residents must be properly notified of relevant board actions. Board members – and CID residents – should all be fully aware that violations of such fundamental rules of fairness are, in fact, violations of the compact that boards make with the residents they represent.

Similarly, residents must both know and fully *appreciate* that they have an obligation to pay attention to what is going on in their community, and have a right both to participate in board meetings, and to run for the board if they are not satisfied with particular votes. Because the value of their own home is ultimately at stake, CID residents may be paying a very real price if they fail to know what is going on, or make their opinions known. This is important, both in the resolution of individual disputes between neighbors, and in the limitations embodied in particular CCRs. Those rules are enforceable as written, but they are not carved in stone. They may be changed using proper procedures.

The Ombudsman's web site can be a helpful starting place for all this information.

#### *B. Toll-Free Number*

Depending on funding (discussed in more detail below), the Ombudsman could also staff a toll-free number to provide information that would supplement that on the website. While the staff could not give legal advice, factual information about what the law is could help to resolve a significant number of emerging disputes before they develop into confrontations.

The toll-free number could also provide other services, depending on the Ombudsman's budget. This function would necessarily be more staff-intensive – and thus more expensive to operate – than establishing and maintaining a website. However, its value would also be greater.

#### *C. Information Gathering*

In addition to the web site, the Ombudsman can be a clearing house for information about CIDs. The Secretary of State's registration process now gathers certain information about CIDs. However, that office has many concerns besides CIDs. An Ombudsman would have CIDs as its sole priority, and can guarantee that CID laws related to (for example) registration of all CIDs are fully complied with. The fact that we know a significant number of CIDs are not even registered with the Secretary of State right now, something required by law, suggests that more focused attention may need to be paid to CIDs than a large state bureaucracy can provide.

The Ombudsman could also collect additional information, or conduct surveys similar to the recent study done by the Zogby polling organization to better understand CIDs within California.

## **ISSUE #2. Should the Ombudsman's Office provide mediation services?**

**Recommendation #2:** *A considerable amount of testimony from residents showed an acute desire for the state to offer a mediation program to CID residents. However, the Committee should only authorize this after determining (1) whether a majority of CID residents in California want such a program, and (2) what effect, if any, a state mediation program would have on the general market for mediation services.*

**Comments:** Testimony from residents showed that some boards of directors do act in violation of the law, perhaps knowing that the cost of enforcing existing rules in the courts is prohibitive to many, if not most people who live in CIDs. This is as serious a problem as flaunting of the law would be by any other elected body. Punishment for such violations should be a high priority for both local and state law enforcement agencies, particularly in light of the continually growing number of CIDs in California. While the current proposal does not include enforcement authority in the Ombudsman's Office, it may be useful to consider whether it should have the authority to review the most severe complaints about legal violations, and make priority recommendations to law enforcement.

Similarly, testimony and letters submitted by boards of directors and others showed that some residents fail to pay legitimate assessments, or abide by other rules established in the CCRs applicable to all residents. These people can create disruptions within the CID, and force boards to make hard decisions about how best to address the problem. Again, court action is a divisive and expensive last resort. However, boards do have a duty to enforce the rules of the CID, and an obligation to those who abide by the rules to assure that transgressions are properly and reasonably dealt with.

In light of the fact that disputes will always be inevitable, mediation programs, both private and public, have become prominent. Mediation can help resolve problems while minimizing potential acrimony. Such programs also have a cost, though it is seldom as expensive as even the most minor court action.

The survey responses to the Zogby poll show that – at least nationally – only a small number of CID residents are unsatisfied in CID disputes. At the national level, 23% of CID residents said they had filed a complaint with their association against another resident, and of those, 72% said the complaint had been resolved to their satisfaction. Thus, in that survey, only about 6% of those who filed complaints were unsatisfied with the resolution. Moreover, 76% of those who had been the *subject* of a complaint – the ones who could be expected to be the least happy about the process -- reported that it had been resolved to their satisfaction.

In this context, it would be important for the Legislature to determine if the number and percentages of California CID residents have similar levels of satisfaction with the existing process. The more individual CID residents who are dissatisfied with existing processes, the greater the need for state intervention to help them. Conversely, if general satisfaction levels are high, this would be evidence that existing private procedures are working for most people.

It is not clear whether the Zogby results deal only with the existing internal CID processes for dispute resolution, or whether satisfaction levels were gauged after some participation in outside mediation programs. Outside mediation programs provide an extra buffer to resolve disputes; if the Zogby numbers on satisfaction include outside processes which helped to resolve disputes that could not be resolved within the CID, then a higher level of dissatisfaction could be expected within CIDs, a level that was being addressed by other means. On the other hand, if the Zogby poll is confined to processes within CIDs, then it is reasonable to conclude that a higher level of satisfaction may exist than reported by Zogby, since some of those dissatisfied with CID processes would achieve resolution through means not reflected in the poll question.

Whatever those numbers would be in California, the proposed mediation function of the Ombudsman's Office is envisioned as a supplement, not just to internal CID processes, but to outside mediation programs, and that fact must be taken into account. As noted by the California Dispute Resolution Council, mediation in the Ombudsman's Office should not be viewed as a replacement for existing private mediation. There are always difficult market balances to be struck when a state office competes with the private sector in offering services.

The most minimal view of the Ombudsman's mediation program would make it available to those who cannot afford private sector mediation. This would make sure that even those without adequate financial means are not confined to having their problems addressed by the very board that may, in fact, be causing the problem. A lack of resources should not equate to a lack of options. A mediation program for those who cannot afford the cost of private mediation assures that cost will not be a barrier for low-income CID residents.

The California Law Revision Commission and the authors, however, seem to have a broader view of the program, in which it would be available to all CID residents in California, irrespective of income. The current proposal does not include a minimum income requirement, or any other criteria for participation in the mediation program, except payment of the fee, which cannot exceed \$25.00. Because the cost of private mediation is generally much higher than \$25.00, this would seem to suggest that the costs would somehow be subsidized.

The Ombudsman's Office, itself, will be paid for by CID owners, and therefore they can legitimately provide themselves a subsidized mediation service if they choose, since their money – rather than taxpayer money from the General Fund -- will pay for it. However, funding of this part of the Ombudsman's Office is still the least developed part of the current proposal. If mediation in this program is to be subsidized through the Ombudsman's budget, this should be explicit, so an appropriate budget can be devised.

Moreover, if the cost of mediation will be below-market, the Committee may wish to consider how this would affect the general market among both private and other publicly-funded mediation services. Any program given the imprimatur of the state can become a formidable force in the market and can drive legitimate competitors out of business, or diminish their competitiveness. While the market for mediation exists beyond just disputes within CIDs, there are clearly some private businesses in existence that would be affected by this proposal. Those businesses already "compete" against other kinds of local government supported mediation, however, and that fact must also be considered.

In addition, concerns have been expressed by staff of the Senate Judiciary Committee concerning the scope of any mediation program that could be developed by the Ombudsman. This issue does not appear to be irresolvable, and is currently under discussion between the authors offices and staff of the relevant committees.

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**ISSUE #3. How should the Ombudsman's Office be funded?**

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**Recommendation #3: *No recommendation.***

**Comments:** While there is some potential value in the Ombudsman's Office, the question of funding will be critical to this proposal. If California's numbers are even remotely similar to the national satisfaction results reported by Zogby, CID residents may not see the value of having the funding for the Ombudsman's Office come out of their pockets. The national levels of satisfaction, participation and lack of interest in state involvement show that most problems in CIDs (again, at the national level) are being resolved as they should be – privately.

This is appropriate for communities that are not, in fact, "governments." In fact, it could be argued that if any individual HOA wanted to fund its own mediation program by imposing an assessment on its residents, it could do so now. This might seem to be an unreasonable choice for all but the largest CIDs, but there is nothing that would prevent smaller CIDs from banding together to create the same sort of program for themselves if they wanted to do so.

The state, of course, is in the best position to do this at the highest level, but the illustration raises the fundamental question here. If CIDs could already assess themselves to create such a program and have not, would the state be imposing something on CID residents that a majority of them do not want?

The answer is unclear. The five dollar a year proposed fee is certainly minimal, as is the proposed maximum fee for mediation services of \$25. And those who understand the advantages of cost-sharing across the largest base could see that, while all residents would not use the system in any given year, the \$5 a year fee would provide a very inexpensive form of insurance for when such services are needed.

However, if the desire for such services is as low in California as the Zogby figures suggest, many residents may make a rational decision that they would rather pay for whatever mediation services they may need individually, if they need them and as they arise. Since (in this analysis), most people would not perceive that they would need such services, the calculation is a rational balancing of perceived individual need against perceived individual cost.

If CID residents are not willing to pay for the Ombudsman's Office, other funding options exist. The state, of course, could pay for such an office out of the General Fund. However, such a proposal is unlikely in the current budgetary environment. Moreover, Californians who do not live in CIDs (still a majority in this state) may not wish to have their tax dollars fund something that is only applicable to a minority of state residents.

Other, more creative solutions may be available, such as a fee on property developers, or dedication of interest earned on HOA bank accounts. There is no question, however, that funding will be a critical question for creation of the Ombudsman's Office.